Volume 48 Number 1 February 2018 ISSN 0378-777x

ENVIRONMENTAL POLICY AND LAW

THE JOURNAL FOR DECISION-MAKERS

2018: The Year of Marine Biodiversity?

IOS Press

ENVIRONMENTAL POLICY AND LAW

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Environmental Policy and Law is sponsored by the International Council of Environmental Law (ICEL), a non-profit, public interest organisation. Opinions expressed in this journal are not necessarily those of the Editors nor of ICEL.

Subscriptions
Environmental Policy and Law (ISSN 0378-777X) is published in one volume of six issues a year. The subscription prices for 2018 (Volume 48) are EUR 615 for online-only subscription, EUR 681 for print-only subscription, and EUR 804 (US$1026) for a combined print and online subscription. Our p.p.h. (postage, package and handling) charge includes airmail delivery of all issues to countries outside Europe. *Personal subscription* rates are available upon request. The Euro price is definitive; the currency equivalents are for your guidance only.
Claims for missing issues will be honoured free of charge within three months after publication of the issue.

Publisher
IOS Press
Nieuwe Hemweg 6B
1013 BG Amsterdam, The Netherlands
Tel.: +31 20 688 33 55
Fax: +31 20 620 34 19
Subscription Department: order@iospress.nl
Advertising Department: market@iospress.nl
Desk editorial Department: editorial@iospress.nl
www.iospress.nl or www.iospress.com

EDITORIAL

Since 2012, the UN has been committed to addressing, "on an urgent basis ... the issue of the conservation and sustainable use of the marine biological diversity of areas beyond national jurisdiction". In 2015, the UN General Assembly (UNGA) adopted Resolution 69/292, under which a preparatory committee (PrepCom) has held four sessions seeking to develop elements of a draft binding instrument on this issue with an "intergovernmental conference" now to be held before the 73rd UNGA session begins this September. The editors of *EPL* have always had mixed emotions about this possibility, from our first awareness of serious proposals and recommendations to commence negotiations, as early as 1999. Indeed, the Editor's last face-to-face legal discussion with our founder Wolfgang E. Burhenne again focused on this issue – one on which we shared similar views.

While strongly committed to environmental protection and conservation beyond national jurisdiction, we have often doubted the logic of virtually all sides of the marine-biodiversity-beyond-national-jurisdiction issue with regard to pathway selection. For example, in the 1990s and 2000s, experts and negotiators who had taken a primary role in the negotiations of the UN Convention on the Law of the Sea (UNCLOS) faced off against a new wave of experts and negotiators. The former strongly opposed new negotiations, stating that these issues were already covered in UNCLOS. The latter considered the issues to be a *lacuna* in UNCLOS. While agreeing with the former that many biodiversity conservation matters are mentioned in UNCLOS, we also opined along with the new wave that these references require further clarification. We strongly disagreed, however, with the proposal that such clarification should come in the form of a formal binding instrument, citing, *e.g.*, the lack of real "binding" language in the most recently adopted multilateral environmental agreements (MEAs), and noting that the current high level of controversy over marine biodiversity would produce another binding instrument that contains no hard commitments or clear definitions. We also expressed concern that binding instrument negotiations would be so lengthy and rigid that they would not produce the positive and immediate change that was already clearly needed. The passage of 19 years has, alas, borne out our concern.

Perhaps the strongest conclusion of our internal deliberations on this issue related to the sweep and evolution of international law. In the 1970s, for example, international environmental law focused on known problems and sought coordinated ways to solve them. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for example, grew out of known and established goals and mechanisms. Its negotiations focused on a well researched, shared objective (conservation) and a type of action (international trade controls) with which States had long experience and understanding. As a result, CITES has been a very effective MEA.

The Montreal Protocol on Substances that Deplete the Ozone Layer (MP) presents a similar picture. States began from a shared experience (pollution control) and a well understood international factor (the transboundary nature of pollution and the international interest in protecting the ozone layer). The MP thus uses known and accepted methods (regulatory controls) to address the problem and is widely cited as the most successful MEA.

By the 1990s, however, objectives and negotiations had changed. The goal of the Convention on Biological Diversity (CBD) was nothing less than ensuring the sustainability of all of the components of the entire "green web" of life on Earth – a goal not addressed directly by any national effort, and only partially understood. International consensus on sustainability issues had declined since the 70s. CBD negotiators remembered the high levels of support for research in the areas of biodiversity, conservation and social welfare during the previous three decades and the resulting quantum leap of human knowledge and capacity in these areas. Accordingly, although a "soft" binding instrument (containing few specific commitments or obligations), the CBD anticipated a continuation of intensive research and efforts towards ensuring biodiversity's sustainability. For example, at Article 7, it expected every country to complete, monitor and use a full inventory of the components of biodiversity within its borders or subject to its jurisdiction. Since the CBD's 1993 entry into force, however, support for the relevant research and technical assistance activities has dwindled significantly and this invaluable tool never came into existence.

In all environmental areas, for the past two decades or more, the bulk of current non-commercial (publicly available) environmental/sustainability "research" consists of "desk studies" compiling and recompiling the results of research in more prosperous decades past. In-country/on-site assistance often consists of little more than meetings and seminars. The anticipated flood of technically specific biodiversity knowledge never materialised, and has never been seriously supported. Despite this deficit of support, international negotiations and adjudications are frequently reduced to arguments over the presence or absence of "scientific evidence" on any point, complicated by the increasing reliance on the concept of "precaution" to support insistence on any action we may want to take, without spending the money to research it first.

In this political/legal climate, the negotiation of a binding instrument on marine biodiversity must face numerous difficult challenges. International marine scientists have made many important discoveries regarding biodiversity beyond national jurisdiction since 1990, but are the first to admit that scientific knowledge regarding the world's oceans is very far from complete. Not only do oceans cover 71 percent of the earth's surface, but they are a "volume" – as much as seven miles deep, with different ecosystems and needs at every level. Moreover, many elements of ocean waters are nearly impenetrable by satellite technology. The concept of "valuable ecosystems and resources" that need to be protected is relative. Today, a known seamount or hydrothermal vent is clearly valuable and in need of protection; tomorrow a heretofore unknown one may be discovered of much greater potential value, but not protected by today's binding instrument. The concept of sustainable use, however, suggests that one of them will probably be open to exploitation. Threats to oceans are vast, with new ones arising every day, and, in a world in which research funding is limited, even the most stringent binding instrument adopted today may need to develop a range of "fast response" measures (a tool that is heretofore unknown in MEAs).

A brief review of the PrepCom's report generally suggests that final negotiations are not expected to conclude in September, or any time soon. The report's "draft elements" are divided into two general categories: "non-exclusive elements that generated convergence among most delegations" and "some of the main issues on which there is divergence of views". Unfortunately, even the "convergence" issues are not "draft elements", but simply an outline – a long list of statements on which the instrument should or could include a provision on a certain issue (*e.g.*, scope, objectives, marine genetic resources, *etc.*) – an approach that suggests that the States may not agree on what each provision should say. As of the end of the fourth PrepCom session, some delegates were calling for up to eight weeks of negotiations, before the "international conference" mentioned in Resolution 69/292 could be held. The situation of ocean ecosystems, however, is increasingly dire. We urge negotiators to work as quickly as possible, but not to follow recent examples of using the need for haste as an excuse to adopt an instrument that is little more than a "placeholder" and offers no true basis for commitments and cooperation to save these precious ecosystems.

Tomme R. Young
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DOI 10.3233/EPL-180041

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DOI 10.3233/EPL-180052

Indonesia

Legal Aspects of Land Purchase/Sale Disputes in Indonesia

by J. Andy Hartanto[i]

Indonesia is an agrarian country, where agriculture is a major source of livelihoods, and therefore matters relating to land have received special protection from the State. As set out in Article 33(3) of the country's 1945 Constitution, "Earth and water and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people". This clause recognises the role of land as an essential factor in meeting its people's primary needs.

The government directly regulates a number of the ways in which land is acquired, including particularly the purchase and sale of land by formal agreement under which the landowner (seller) pledges to surrender his/her rights to certain land to another party (the buyer), who in turn is bound to pay the agreed price.[1]

Indonesia is a constitutional State, as set forth in Article 1(3) of the 1945 Constitution of the State of the Republic of Indonesia, the third amendment of which is commonly known as the Rule of Law. The concept of the rule of law was originally developed in continental Europe, among others by Immanuel Kant, Paul Laband, Julius Stahl, Johann Fichte, and others using the German term "*Rechtsstaat*". Indonesia recognises the rule of law as law enforcement, general justice and sovereign government.

Since the Basic Agrarian Law came into force, there has been a fundamental shift in land law, toward Indonesian agrarian law, placing these issues directly under governmental control. There have, therefore, been fundamental changes to both the structure of the legal instruments, the underlying concepts, and the manner in which disputes are addressed. Specifically, that basic agrarian law must operate in the best interests of the Indonesian people and must also meet their needs according to the demand of the times.[2]

The sale and purchase of land is a mutual obligation – both parties must be bound. As to each commitment in such a purchase, one side obtains and asserts a right, and the other fulfils an obligation. Between these rights and obligations there is an economic value,[3] and a legal status. Therefore, the operation of an agreement cannot always do anything that is desired by the parties, but is bound by the law.

The process of buying and selling land may cause a dispute in cases involving differences in the values, interests and opinions of the individuals or legal entities involved, and divergent perceptions concerning the status of the land tenure, and/or the ownership and utilisation of relevant lands.[4] Each party's attempt to implement the agreement on the basis of imprecisely agreed rights and obligations will eventually lead to a dispute.

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The land purchase/sale agreement is considered to be a binding, executory agreement, because immediately after concluding the agreement, the two parties have transferred neither the land itself nor the price – the main elements of the agreement.[5] At that point, the parties must meet several conditions, the exact parameters of which have been determined by the applicable legislation, in order for the transfer of land rights to be legally recognised. If a land purchase/sale process does not meet these requirements, it may not be legally registered.

Considering the importance of land in human life, conflicts and disputes about land ownership are relatively common. Clearly, a number of legal issues are of daily importance – how one might own/purchase land; what legal requirements apply; and what validates or invalidates a sale transaction. In practice, however, the most difficult legal questions arise out of the cases in which the status of a particular parcel of land is in dispute, but the purchase/sale transaction goes forward anyway. The parties to the dispute, even those that are not directly parties to the purchase/sale, have a great influence on the rights and obligations of the purchase/sale transaction. As a result, those rights and obligations must be resolved, whether through the relationship between the parties or by judicial process.

In this study the authors will focus on two principal issues: the basic procedures relating to land ownership in Indonesia; and the legal requirements for addressing land purchase/sale disputes.

Research Method

Recognising research as a fundamental tool for scientific development, and legal research as a tool for the development of the science of law, the authors have emphasised the general purpose of all research – to express the truth systematically, methodologically and consistently. Legal science is normative by nature.[6] Thus the research method it requires is quite unique in comparison with those used in the natural sciences or the social sciences.[7] As a result, this study is based on normative legal research involving the review and analysis of legal materials and legal issues. This research focuses on the legal aspects of the problems that arise with regard to the purchase and sale of lands whose legal status is in dispute. Its conclusions suggest potential methods to overcome those problems.

This article reflects research based on legislation, official records and legal treatises. It takes the country's Basic Agrarian Law (UUPA)[8] as its primary legal material. Secondary legal materials used include publications (not official documents) discussing or considering some aspect of this law, including legal textbooks, theses, dissertations and dictionaries, as well as comments on court decisions and expert legal opinions published in journals, magazines or websites.

Discussion

Land Ownership in Indonesia

Land/agrarian regulations existed in Indonesia well before independence – that is, in the country's colonial era – and earlier during its "kingdom period". In the latter, however, land matters were regulated by decree of the King, and all lands belonged only to the King and his subordinates, with the people having the authority to work on it only if they formally obtained that authority under a share-cropping arrangement.

When the Dutch government came to Indonesia, land rights in the country were still dominated by the King. The main change was that the old share-cropping system was enhanced by converting the cultivator from share-cropper to tenant under a lease (*Landrente*) granted by the King, who still owned the land. A land registration system limited to tenant farmers emerged during this time and over a few years it was developed and broadened to allow leasing to private parties.

In the opinion of Erman Rajaguguk, the leasing of land was promoted by the Raffles government (during British colonial rule) and the government of Governor-General van der Cappelen (during Dutch colonial rule) as an attempt to change the fate of the peasants by reducing the power of the Bupati (Regent) and other upper-level officials, and releasing their power over the land. He further opines, however, that the real motive was to liberalise the economic system in Java, and to make land more attractive to foreign investors and otherwise enable greater exploitation in the colony.[9]

The UUPA[10] was established in the 1960s by the Indonesian government. It sought to lay a groundwork of legal certainty on land rights for all people through the land registration process. Every province has adopted a basis for realising legal certainty over the land rights of all the people of Indonesia, especially peasants.

The system of registration of rights is established through a combination of two legal mechanisms: a formal register (land book) containing juridical and physical proof of ownership, and official certificates documenting the rights registered. The official record provides clear evidence of the rights concerned and the holder thereof, for each plot of land that is legally registered.[11]

There are many ways of transferring the right to land, some of which may occur without a formal legal action. For example, following the death of a landholder, the estate relocates to his heirs. Of course, a land right may also be transferred by a formal legal action or document such as a purchase/sale agreement, grant, exchange or other legal action.

According to Article 37 of the 1997 Government Regulation on Land Regulation:

(1) A transfer of a land right or an apartment ownership right resulting from a sale/purchase transaction, from an exchange, from a grant, from incorporation into a company, or from any other legal act effecting such a transfer with the exception of an auction can be registered only if it is evidenced with a deed made by the authorized PPAT [Land Titles Registrar] *in line with the applicable regulations.*

(2) Under certain circumstances as determined by the Minister, the Head of the Land Office can register

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> *a transfer of a right on a land parcel with the status of* hak milik *(right of ownership) between individuals of Indonesian citizenship which is evidenced with a non-PPAT deed, provided that the Head of the Land Office evaluates the deed as having an adequate content of truth to warrant the registration of the said transfer.*[12]

This regulation does not specify what is meant "transferred" and "to be transferred".

The transfer of rights to land by purchase/sale agreement is governed as is any contract or agreement by Book III of the Indonesian Civil Code; the understanding of the engagement is a legal relationship concerning property wealth between two or more parties, under which one party has a right to demand action and the other an obligation to meet the demands.[13,14] In other words, under such an agreement, two or more parties agree to bring about a particular legal effect.[15] There are, however, limits to the ability to transfer land rights in Indonesia. On the one hand, the party transferring their right must have the right and authority to transfer the right. On the other, the purchasing party must be eligible to hold the land right in question. The purchase/sale of any of the following rights is only legally recognised if the land in question is owned by an individual Indonesian citizen: cultivation rights, rights to construct buildings on land, ownership of flats on land, ownership of one or more flats within a building whose ownership is separate from the ownership of the underlying land.[16]

As noted above, inheritance transfers may occur without any formal legal document. Apart from this, the only permissible means of land transfer are the following: by grant, through conventional purchase/sale transaction, as part of a formal exchange, as a distribution of the recipients' share in the dissolution of a collective rights arrangement, as consideration in a corporate transaction, by waiver, by auction or as one element of a company merger.[17]

In the process of land purchase/sale, certain formalities are, of course, required. Deeds serve as official evidence of the transaction, when properly made by the authorised official following all procedural requirements. The formal conditions of the purchase/sale must be reflected in the deed, and thus the parties need to provide clear evidence of all aspects of the agreement to the PPAT.

Once the deed is properly issued and recorded, the transaction is considered to have met the requirement that changes in land registration must be publicised, *i.e.*, everyone can know the physical data in the form of location, size, boundaries of land, and juridical data (rights involved, transfer of title, *etc*.).

Before the UUPA, land registration processes only applied to certain lands – those subject to western law (for example, *Eigendom* rights, *Erfpacht* rights, Option rights).[18] This system of land registration is generally known as *Recht Kadaster*. Lands subject to customary law (known as, *e.g.*, *yasan* and *gogolan* land) are not and may not be registered.

The data and information contained in a land certificate/deed has legal force and is presumed to be correct information, without any further proof.[19]

Purchase/Sale Disputes

As described by Suyud Margono,[20] legal disputes concerning land arise where one party (the plaintiff) files a legal complaint that the actions of another person have harmed the plaintiff's right to land. The lawsuit provides a means of developing an administrative resolution of the situation in accordance with the applicable regulations. In 2011, the Indonesian National Land Agency noted that various land disputes, conflicts and land affairs cases had been submitted for handling and settlement in accordance with national legislation and/or land policy.

These cases involved landowners seeking to transfer their rights in the land, addressing both situations in which the owners' claim of title was registered and situations in which it was unregistered. Conflicts sometimes involved claims of "diverting" the property – that is transferring property, where some or all of the property's land rights were owned by a different person, whose rights were affected by the transfer. These cases have examined a range of transactional factors, particularly the nature and compliance with the formal procedures and mechanisms, as affected by the nature or circumstances. However, the primary factor in these cases focused on the existence of evidence of land title. As explained above, for land already registered, this means documentary proof of ownership in the form of a deed or "certificate"; and for unregistered or uncertified land, it requires other kinds of "supporting evidence". Thus, these cases involved a range of documents including deeds, formal grant instruments and letters of inheritance.

In the purchase/sale of land or buildings in Indonesia, the deed is made by notary or by the PPAT. In one recent case, it was stated that, without such a deed, the transfer of land or buildings made under a contract between the seller and buyer was invalid and would not result in the desired transfer, even if the buyer had paid the full price.[21]

In addition to the requirement of preparing a deed (locally known as an "AJB") by a notary or in the PPAT, the purchase of land or buildings requires two elements of due diligence – a physical inspection and a public record inquiry including a visit to the tax office to check the tax audit on property tax, and one to the local land agency to inspect the land and building certificate. The prospective buyer can also make sure the land and buildings are not in dispute by applying to the District Court where the land and buildings are located. If all the property tax obligations have not been paid or if the land is officially under a dependent, under warranty or is formally listed as a property subject to legal dispute, these matters must be dealt with before the transaction is undertaken. If all these inspections are clear, the parties can complete the purchase/sale by making an AJB in the PPAT office. If the seller or buyer do not understand the process and procedures for the inspection

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of the land as mentioned above, the seller and buyer may request a notary or the PPAT to perform the inspection before the AJB is made.

The land purchase/sale procedure described above is formally set forth according to the prevailing provisions in applicable laws,[22] which specifically require the AJB attested in the presence of the PPAT.

Although the rights of the seller must be clear, the law also states that the seller may authorise another to undertake purchase/sale of rights to land, granting that power formally in accordance with the provisions subject to civil law, whether in the presence of a notary or "under the hand", as defined in the Civil Law Code which states (in substance) that "power may be granted and accepted in a public deed, in a handwritten text, even in letters or orally".[23] This power may confound the above protections, particularly with regard to the transfer of land rights that are in dispute, enabling the purported seller to create a written authority despite the existence of the dispute. This possibility may add risks and legal consequences to the transaction.

Thus, the purchase/sale of disputed land in Indonesia can be declared legally void, because it meets neither the required formalities nor the legal requirements of the agreement as referred to in Article 1320 of the Civil Code, which requires that transactions be undertaken in good faith. Indonesian law allows settlement of such disputes either through litigation and/or a non-litigation process, and upholds both kinds of settlement. As Article 24 of the 1945 Constitution states: "Judicial power is an independent power to administer justice in order to uphold law and justice".

The object of the institution of the above processes has been to emphasise the need for diligence and care in land transactions – to be certain that the seller is a legitimate party and entitled to sell. By requiring that the seller's rights of ownership are distinct and clear, the law eliminates the legal risks of transfer of such rights. Where land has not been registered, however, or where ownership rights are in dispute, the transfer could be extremely vulnerable and risky.

Conclusion

Indonesian land rights must be registered and meet the terms and conditions as set forth in Rule No. 24 of 1997 with the goal of ensuring that the Indonesian land registration and transactional systems fulfil the three basic goals of any such system, namely: certainty, benefit and fairness. The transition and registration of land rights has provided legal certainty in the form of a deed/certificate of land as authentic proof of the transaction by which the current owner acquired the property. It provides authentic evidence (perfect proof), enabling justice for those seeking clarification and/or recognition of land ownership.

A purchase/sale transaction that attempts to transfer land that is the subject of an on-going dispute can be declared void by law, either because it does not meet the formalities required for a land transaction, or due to the lack of good faith.

Notes

1 Harsono, B. 2003. *Sejarah Pembentukan Undang-Undang Pokok Agraria: Isi dan Pelaksanaan*, at 27. Jakarta: Djambatan.
2 Harsono, B. 2005. *Hukum Agraria Indonesia, Sejarah Pembentukan UUPA, Isi dan Pelaksanaan*, at 1. Jakarta: Djambatan.
3 Satrio, J. 1992. *Hukum Perikatan*, at 43. Bandung: Alumni.
4 Wibawanti, E.S. and Murjiyanto, R. 2013. *Hak Atas Tanah dan Peralihannya*, at 7. Yogyakarta: Liberty.
5 Civil Law Code (*Burgerlijk Wetboek*), Article 1458.
6 Hadjon, P.M. and Tatik Sri Djatmiati. 2005. *Argumentasi Hukum*, at 1. Yogyakarta: Gajah Mada University Press.
7 Marzuki, P.M. 2006. *Penelitian Hukum*, at 26. Jakarta: Prenada Media.
8 Law No. 5/1960 (*Undang-Undang Pokok Agraria*).
9 Rajaguguk, E. 1995. *Hukum Agraria: Pola Penguasaan Tanah dan Kebutuhan Hidup*, at 13. Jakarta: Chandra Pratama.
10 *Supra*, note 8, State Institution of 1960 No. 104, Supplement to the State Gazette No. 2043.
11 *Ibid*., at 221.
12 Government Regulation No. 24/1997 on Land Regulation.
13 Subekti, R. 2001. *Hukum Perdata (Ed: XXIX)*, at 122. Jakarta: Inter Masa.
14 Satrio, J. 1993. *Hukum Perikatan: perikatan pada umumnya*, at 12. Bandung: Alumni.
15 Sudikno Mertokusumo. 1996. *Mengenal Hukum Suatu Pengantar*, at 103–104. Yogyakarta: Liberty.
16 *Supra*, note 13.
17 Hartanto, J.A. 2009. *Problematika Hukum Jual Beli Tanah Belum Bersertifikat*, at 131. Yogyakarta: Laksbang Mediatama.
18 *[The terms "Eigendom Rights" and "Erfpacht Rights" were apparently coined during the Dutch colonial period. Dutch law recognises eight real property rights, of which ownerships ("eigendom") and long leaseholds ("erfpacht") are only two (others include apartment rights, mortgages and pledges). See http://www.dutchcivillaw.com/content/legalsystem033.htm. In Indonesia, these rights are apparently described differently, but also represent only a fraction of property rights. Ed.]*
19 Hutagaluh, A.S. 2000. "Penerapan Lembaga Rechtverweking Untuk Mengatasi Kelemahan Sistem Publikasi Negatif dalam Pendaftaran Tanah". *Majalah Hukum dan Pembangunan* 4: 328, at 328.
20 *See* Murad, R. 1991. *Penyelesaian Sengketa Hukum Atas Tanah*, at 22. Bandung: Alumni.
21 Sukandar, D. 2013. "Factors that Cause a Sale/Purchase of Land to Be Considered Unlawful" [in Indonesian]. *Kompas.com*, 28 April, online at http://tekno.kompas.com/read/2013/04/28/1149386/penyebab.jual.beli.tanah.dianggap.tidak.sah.%20diakses%2011%20Juli%202017.
22 *Supra*, note 8, and Government Regulation No. 10 of 1961 amended by Government Regulation No. 24 of 1997 on Land Registry. Statute Book of 1997 No. 59, Supplement to Statute Book No. 369.
23 *Supra*, note 5, Article 1792.

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